SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAY 30 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1382

RAYMOND A. KLEMMER,
Petitioner,

versus

STATE OF ALABAMA,
Respondent.

APPLICATION FOR RE-HEARING AND ARGUMENT IN SUPPORT THEREOF

J. PAUL LOWERY
Attorney at Law
Suite 800 - Bell Building
Post Office Box 411
Montgomery, Alabama 36101

INDEX

Page

Request for Re-Hearing 1

Reasons for Granting a Re-Hearing 2

Conclusion 4

Certificate of Counsel 4

Certificate of Service 5

TABLE OF AUTHORITIES

Graham v. State, 46 Ala. App. 608, 246 So.2d 675 .... 2, 3

Lisenba v. Cal., 314 U.S. 219 3

Palko v. Conn., 302 U.S. 319 3

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

Section 1 . . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-1382

RAYMOND A. KLEMMER,
Petitioner,

versus

STATE OF ALABAMA,
Respondent.

APPLICATION FOR RE-HEARING AND ARGUMENT IN SUPPORT THEREOF

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Raymond A. Klemmer, respectfully requests this Honorable Court to grant a re-hearing in this cause and to reconsider its decision and to review the Transcript of the proceedings therein.

Petitioner further respectfully requests that this Honorable Court reconsider the Petitioner's Brief originally filed herein in support of his Petition for Writ of Certiorari and the errors cited therein, and

the reasons cited herein for granting an Application for Re-Hearing in this cause.

Further, your Petitioner respectfully requests that this Honorable Court, during the pendency of this Application for Re-Hearing, enter an Order staying and suspending execution of judgment.

REASONS FOR GRANTING A RE-HEARING

The indictment against the Defendant charged that he "feloniously took and carried away one 1971 Monte Carlo Chevrolet automobile at a value of $4,000.00, the personal property of Bill Heard Chevrolet, a Georgia Corporation, against the peace and dignity of the State of Alabama" (R. p. 1).

The law in Alabama has been that in a prosecution for larceny, wherein the indictment layed ownership of property alleged to have been stolen in a named corporation and where the State fails to establish the legal existence of the corporation or ownership of the allegedly stolen property in that corporation, the Defendant is entitled to the affirmative charge. *Graham v. State*, 46 Ala. App. 608, 246 So. 2d 675. The only evidence presented by the State which tended to establish the identity of Bill Heard Chevrolet, Inc., as a Georgia corporation, was the testimony of James H. Yarnall. Yarnall testified over objection that Bill Heard Chevrolet was a Georgia corporation. The Defendant objected on the grounds that said testimony was not the best evidence as to whether or not in fact Bill Heard Chevrolet was a Georgia corporation. How-

ever, the Trial Court erroneously allowed this testimony to become part of the evidence for the jury's consideration (R. p. 12).

This case is analogous to the case of *Graham v. State*, supra, wherein the only evidence of the fact of incorporation was the testimony of the owner of the company. The Court there held that such testimony fell short of establishing the legal existence of the alleged corporation. Further, the Court stated, "In prosecution for grand larceny it is incumbent on the State to offer ownership of the stolen property as layed in the indictment. A failure to do so is a fatal variance in the *allegata* and *probata*."

The only testimony which tended to establish ownership of the automobile in question in Bill Heard Chevrolet was the testimony of Otis Daniel who was an employee of Bill Heard Chevrolet. Mr. Daniel simply testified that he placed the particular automobile in question on the Heard storage lot on April 1, 1971. According to this witness the last time he saw the car on the lot was April 17, 1971.

The Fourteenth Amendment Due Process Clause is viewed as incorporating traditional notions of due process, described quite generally as those principles, "implicit in the concept of ordered liberty." *Palko v. Conn.*, 302 U. S. 319. As applied to this case, this view of due process requires that the State of Alabama afford the Defendant, Raymond Klemmer, "that fundamental fairness essential to the very concept of justice." *Lisenba v. Cal.*, 314 U.S. 219. Mr. Klemmer was denied

due process when the State failed to prove as alleged in the indictment that the automobile in question was owned by Bill Heard Chevrolet, a corporation, and for such fatal variance which resulted in a denial of due process the judgment of the Trial Court is due to be reversed.

CONCLUSION

WHEREFORE, Petitioner respectfully submits that this Court should grant the Application for Re-Hearing prayed for herein.

J. PAUL LOWERY
Post Office Box 411
Montgomery, Alabama 36101

Of Counsel
Lowery and Pool
Suite 800 — Bell Building
Montgomery, Alabama

CERTIFICATE OF COUNSEL

I, J. Paul Lowery, do hereby certify that Petitioner's Application for Re-Hearing is presented in good faith and not for reasons of delay and relates to a substantial contention not heretofore raised by Petitioner.

J. PAUL LOWERY

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing Application for Re-Hearing to the Honorable William Baxley, Attorney General for the State of Alabama, at his proper Post Office Address in Montgomery, Alabama, with proper postage thereon prepaid.

This ____ day of May, 1974.

J. PAUL LOWERY
Of Counsel for the Appellant

Counsel for the Appellant:
J. PAUL LOWERY
P. O. Box 411
Montgomery, Alabama 36101